

2. Procedures Order at 9.

On April 6, 2011, Barrett Holby, Grethe Holby, Kristin Holby, and Wegard Holby (together, the "Holbys"), neighboring landowners to the parcel on which the Project is proposed to be located, filed motions to intervene .

On June 6, 2011, the Board issued its Order granting the Petitioner a CPG for the Project. The Order also granted the Holbys' motions to intervene in the proceedings.

On June 15, 2011, the Holbys filed a motion to alter the Order ("Motion") on the grounds that the Project does not comply with the applicable criteria of 30 V.S.A. § 248a, and that the Order violates the Holbys' "procedural due process rights."³

On June 29, 2011, the Petitioner filed in opposition to the Motion requesting that the Board deny the Motion because the Holbys "have failed to articulate a legitimate basis for altering the Order." ⁴

III. DISCUSSION AND CONCLUSION

The basis for the Holbys' Motion is twofold. First, the Holbys contend that "as indicated in their Motions to Intervene the project violates clear written community standards intended to preserve aesthetics and scenic beauty of the town."⁵ In support of this argument, the Holbys list a number of provisions from the Weston Telecommunications Bylaws with which, they allege, the Project does not comply. In addition, the Holbys argue that had they been "given a meaningful opportunity to take discovery" they would have demonstrated that the Project could have been sited at alternative sites to further mitigate its impacts on the surrounding environment.

Second, the Holbys maintain that "the dictates of due process require a hearing in this matter."⁶ The Holbys contend that the notice they received regarding the Project was deficient in that it did not make reference to the Board's Procedures Orders and, therefore, the Holbys were unaware that they were required to submit comments and request a hearing within 21 days of the

3. Holbys Motion to Alter at 7.

4. AT&T Response at 1.

5. Holbys Motion to Alter at 2.

6. *Id.* at 8.

application filing date. Accordingly, the Holbys argue that the Board should deny the Petitioner's CPG or, in the alternative, reopen the proceedings to provide the Holbys an opportunity for discovery and a hearing in this matter.

The Petitioner asserts that the Motion should be denied "on the grounds that the Holbys raise arguments that the Board has already rejected."⁷ The Petitioner contends that the Holbys argued in their motions to intervene that the Project conflicts with provisions of the Weston Town Plan and Bylaws and that, despite these arguments, the Board found that the Project did not raise any significant issues or violate any clear written community standards. The Petitioner notes that it identified and addressed many of the nonconformities raised in the Holbys' Motion in the petition. The Petitioner maintains that the Holbys' use of the present Motion "to specifically list the Town Bylaw provisions that the Project allegedly violates does not change the outcome."⁸

The Petitioner also argues that the Holbys' due process rights have not been violated. The Petitioner contends that "procedural due process merely requires the opportunity to be heard" and the Holbys "were afforded ample opportunity to be heard" through the 45-day advance notice period and the 21-day comment period before the Board. The Petitioner argues that requiring a "hearing on every application would be burdensome on the state and undermine the General Assembly's intent to encourage the rapid, statewide deployment of wireless telecommunications infrastructure."⁹ The Petitioners maintain that the Project was "fully disclosed and described" to the Holbys and other interested parties during the advance notice period, and that the Petitioner extended the advance notice period approximately four months beyond the required 45 days, providing an opportunity to ask questions and offer comments.¹⁰ Finally, the Petitioner contends that the Holbys should not "be allowed to plead ignorance and shift the blame for their

7. AT&T Response at 2.

8. *Id.* at 2.

9. *Id.* at 5.

10. *Id.* at 5-6.

unsatisfactory filing."¹¹ The Petitioner maintains that the Holbys were informed of their opportunity to participate before the Board and that the record demonstrates that the Holbys "took advantage of that opportunity, abnegating any claim of procedural unfairness." The Petitioner argues that the Holbys "failure to provide evidence in support of their concerns or identify a valid property interest is not due to the mistake or inadvertence of the Board."¹²

We conclude that the Motion fails to present sufficient grounds to alter our decision for the reasons set forth below.

Section 248a(f) establishes the following review procedures for applications submitted pursuant to Section 248a:

Unless the public service board identifies that an application raises a significant issue, the board shall issue a final determination on an application filed pursuant to this section within 90 days of its filing or, if the original filing did not substantially comply with the public service board's rules, within 90 days of the date on which the clerk of the board notifies the applicant that the filing is complete. If the board rules that an application raises a significant issue, it shall issue a final determination on an application filed pursuant to this section within 180 days of its filing or, if the original filing did not substantially comply with the public service board's rules, within 180 days of the date on which the clerk of the board notifies the applicant that the filing is complete.

Pursuant to 30 V.S.A. § 248a(k):

The public service board may issue rules or orders implementing and interpreting this section. In developing such rules or orders, the board shall seek to simplify the application and review process as appropriate . . .

On August 31, 2009, the Board issued its Procedures Order pursuant to § 248a(k). Section K of the Procedures Order requires that:

If any person wishes to submit comments to the Board concerning an application filed pursuant to Section 248a or request a hearing, such correspondence is due at the Board within 21 calendar days of the date that the application was submitted to the Board and all required parties.

11. *Id.* at 6.

12. AT&T Response at 7.

The Procedures Order is readily available at the Board offices and on the Board's website, as are the more than thirty orders issued regarding applications filed pursuant to the Procedures Order.

On October 5, 2010, approximately five months prior to filing its application with the Board, the Petitioner filed the required advance notice with all the required recipients, including the Holbys. At Section VI, the advance notice states that:

Once AT&T's petition is filed with the Board, any interested person may submit comments and seek intervention in the proceeding within 21 calendar days of the date the petition was filed. Unless the Board determines that an application raises a significant issue under the statutory criteria, the Board may issue a final determination on the petition within 45 days of its filing or upon determination that the filing is complete.

Further, at Section VII, the notice states that any inquiries regarding the Project can be directed to the Petitioner, provides contact information, and notes that recipients "will have an opportunity to file comments with the Public Service Board directly once the petition is filed."

On March 18, 2011, the Petitioner filed its petition and prefiled testimony with the Board and required recipients.¹³ The petition clearly indicates that it is being filed pursuant to the Procedures Order and makes numerous specific references to that order.¹⁴

The advance notice provided by the Petitioner to the Holbys clearly indicates that interested persons will have the opportunity to submit comments, in addition to motions to intervene, regarding the petition with the Board within 21 days of its filing. Therefore, the Holbys, contrary to the claims in their Motion, were sufficiently notified of this requirement at the time of the advance notice. We also note that the advance notice was provided approximately five months prior to the petition being filed with the Board. This extended advance notice period should have provided ample time and opportunity for the Holbys to ask questions of the Petitioner regarding the Project, and to determine whether the Board had adopted procedures or issued orders pursuant to § 248a(k). The Holbys are correct in asserting that the advance notice

13. The petition itself is not required to be sent to the adjoining landowners; however, it is clear from the specific references to the petition in the Holbys' motions to intervene that the Holbys had either acquired a copy of the petition, or had otherwise reviewed the petition.

14. See Petition at Section 4 at 1, 3; Section 6 at cover page and at pgs. 3-4; Section 6.B.1 at 1.

does not make specific reference to the Board's Procedures Order. However, the actual petition, as noted above, contains numerous specific references to the Board's Procedures Order.

Therefore, the Board concludes that the Holbys were given sufficient notice of the deadline for submitting comments, prior to submitting their comments on the petition, and of the Procedures Order. Accordingly, we conclude that the Holbys procedural due process claims are without basis.

With respect to the Holbys' contention that the Project violates a clear written community standard, these arguments should have been raised within the 21-day comment period in advance of the issuance of our Order approving the Project, and, as such, are late filed and not properly considered here. Further, the Holbys maintained that the Project conflicted with provisions in the Town Plan and Bylaws in their motions to intervene. The Petitioner adequately addressed the Project's non-conformance with many of these same zoning provisions in the petition. Despite this non-conformance with the zoning bylaws, as noted in Finding No. 28 of the Order, we found that the Project does not violate any clearly identified community standards contained in the town or regional plans. As the Board noted in a previous Order, "it is more appropriate to rely on the town plan as the primary source of clear written community standards."¹⁵ Therefore, even if we were to consider the Holbys' claims as presented in the Motion, the Holbys have not provided a basis for altering our decision in this regard.

A motion to alter or amend "allows the trial court to revise its initial judgment if necessary to relieve a party against the unjust operation of the record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party." *Rubin v. Sterling*, 164 Vt. 582, 588 (1996). In this case, the Board received only motions to intervene on behalf of the Holbys within the comment period. The Holbys' failure to file comments or request a hearing on the petition within the prescribed comment period did not result from any mistake or inadvertence on the part of the Board, but solely from the fault or neglect of the Holbys.

Accordingly, the Motion to Alter is denied.

SO ORDERED.

15. See *Petition of Georgia Mountain Community Wind, LLC*, Docket No. 7508 Order issued 6/11/10, at 53.

Dated at Montpelier, Vermont, this 10th day August, 2011.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: August 10, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.